



Grutter v. Bollinger: Justice Ruth Bader Ginsburg's Legitimization of the Role of Comparative and International Law in U.S. Jurisprudence

Citation

Deborah E. Anker, Grutter v. Bollinger: Justice Ruth Bader Ginsburg's Legitimization of the Role of Comparative and International Law in U.S. Jurisprudence, in Essays in Honor of Justice Ruth Bader Ginsburg (Feb. 4, 2013) [on file with the Harvard Law School Library].

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:10582556>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

GRUTTER V. BOLLINGER:
JUSTICE RUTH BADER GINSBURG'S LEGITIMIZATION OF THE
ROLE OF COMPARATIVE AND INTERNATIONAL LAW IN
U.S. JURISPRUDENCE

Deborah E. Anker¹
Clinical Professor of Law
Director, Harvard Immigration and Refugee Clinic

In *Grutter v. Bollinger*, a 2003 decision in which the U.S. Supreme Court upheld the University of Michigan's admissions policy of considering race in order to enhance the school's diversity, Justice Ginsburg wrote a powerful concurrence that applied international and comparative law to the interpretation of U.S. constitutional law. Although she did not agree with the majority's decision to set a firm sunset date for the office of affirmative action, Justice Ginsburg reasoned that the majority's "observation that race-conscious programs 'must have a logical end point,' accords with the international understanding of the office of affirmative action."² Specifically, Justice Ginsburg noted the consistency between the majority's decision and the principles embraced in international treaties concerning the elimination of racial discrimination and discrimination against women.

In a recent speech, Justice Ginsburg noted the deep American roots of an internationalist approach in, for example, the writings and pronouncements of Professors Roscoe Pound and John Henry Wigmore, as well as John Adams. She also emphasized the tradition of judicial reference to foreign and international law, stating that "[t]he U.S. judicial system will be poorer . . . if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."³ She cited among several recent examples the U.S.

Supreme Court's decisions in *Atkins v. Virginia* and *Lawrence v. Texas*.⁴ Justice Ginsburg referenced the U.S. Declaration of Independence and underscored her belief that "the U.S. Supreme Court will continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility." Eloquently and succinctly she concluded, "[Y]ou will not be listened to if you don't listen to others."

The need for such an internationalist approach is nowhere more pressing than in my own field, international refugee law, where the reference to international and comparative law is a matter of statutory, as well as constitutional, imperative. The Refugee Act of 1980 was enacted with the explicit purpose of implementing the 1967 Protocol Relating to the Status of Refugees (Protocol).⁵ In particular, Article 1 of the Protocol defines a refugee and Article 33 enunciates the foundational norm of *non-refoulement*, the prohibition against returning a refugee to the country of anticipated persecution.

In the human rights context, the Refugee Convention is a unique treaty in that there is no treaty-based international body with explicit norm-interpreting authority. Rather, the treaty is implemented through states parties' judicial systems in the process of individual determinations of claims to refugee status eligibility and protection. Thus, states parties (including at times the United States, however haltingly), in a spirit of comity, have relied on each others' doctrinal interpretations in creating a transnationalized body of international refugee law.

In one of its major internationalist decisions, *I.N.S. v. Cardozo-Fonseca*, the U.S. Supreme Court in 1987 found that interpretation of the U.S. definition of a refugee must be consistent with the treaty upon which it was based. Given this background, Justice Blackmun in his concurrence emphasized that the administrative agency should be guided by international standards when interpreting the Refugee Act and the United States' treaty obligations under the Protocol because of the Protocol's "rich history of interpretation in international law and scholarly commentaries."⁶

Earlier, in 1986, the Board of Immigration Appeals (BIA or Board) wrote one of the seminal decisions in refugee law, *Matter of Acosta*, which

has had broad international reach. In that case, the Board established the “immutable characteristics” paradigm for interpreting the “particular social group” (PSG) ground in the definition of refugee, rooting interpretation in principles of non-discrimination fundamental to domestic and international law.⁷ In recognition of these principles and in a spirit of comity, other states parties, including the Supreme Court of Canada and the U.K. House of Lords (now the Supreme Court of the United Kingdom), among others, have adopted the BIA’s approach to interpreting the PSG ground. This became a precedent for comity in interpretation of not only this but other provisions of the Refugee Convention as well.⁸ However, even as this respect for the international nature of the treaty was being recognized broadly by other states parties, the United States backed off of its own *Acosta* precedent, precipitating a prolonged (and ongoing) battle within the United States regarding the meaning of the PSG ground for asylum.

Sadly, the U.S. Supreme Court itself retreated from an internationalist approach in its infamous 1993 decision *Sale v. Haitian Centers Council, Inc.*, regarding the scope of refugee law’s fundamental *non-refoulement* or nonreturn obligation, despite the United Nations High Commissioner for Refugees’ briefing to the contrary.⁹ In short, in the interpretation of a clearly international law-based statute, the United States has been both a leader and one of the most significant naysayers in bringing to bear principles from international and comparative law.

Fortunately, in a recent 2009 decision in which Justice Ginsburg joined the majority, *Negusie v. Holder*, the U.S. Supreme Court endorsed the role of comparative sources in interpreting the “persecution of others” bar to asylum. Citing cases from Canada, the United Kingdom, Australia, and New Zealand, the Court noted that, “[w]hen we interpret treaties, we consider the interpretations of the other courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty’s language.”¹⁰

Scholars and advocates have been trying hard to reverse the erroneous reinterpretation of the PSG ground of asylum, both preceding and

following the U.S. Supreme Court's decision in *Negusie*. We academics and practitioners in the field of refugee law thank Justice Ginsburg for taking leadership in legitimizing the role of comparative and international law in our national context.



ENDNOTES

- 1 Special thanks to Phil Torrey in providing research assistance.
- 2 *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).
- 3 Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Address at the International Academy of Comparative Law at American University (July 30, 2010).
- 4 In 2002, the U.S. Supreme Court held in *Atkins* that the execution of a mentally retarded person convicted of a crime was unconstitutional, in part, because “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” 536 U.S. 304, 316 (2002). The following year in *Lawrence*, the Court, citing numerous European Court of Human Rights decisions, held that a Texas statute prohibiting consensual intercourse between members of the same sex was unconstitutional. 539 U.S. 558, 576-77 (2003).
- 5 In 1968, the United States ratified the Protocol, which incorporated most of the provisions of the 1951 Convention Relating to the Status of Refugees (Refugee Convention). The Refugee Convention embodies the principle of surrogate or alternative state protection for persons who face serious harm in their home countries based on their status or beliefs, when the home country has failed to protect those persons.
- 6 *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 450 (1987) (Blackmun, J., concurring).

- 7 For an extensive discussion of *Acosta*, and the PSG ground generally, see DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES §§ 5:42-5:66 (5th ed. 2012).
- 8 See Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 136 (2002) (referring to the international development of refugee law, “several states’ administrative bodies and courts engage in a productive dialog with one another . . . [and] they are beginning to create a complex and rich body of ‘transnationalized’ international law”).
- 9 Several refugee law commentators were critical of the *Haitian Centers Council* decision. See, e.g., Keith Highet et al., *Aliens—Interdiction of Haitians on High Seas—Definition of “Return” Under U.S. Statute—Extraterritorial Effect of Statute*, 88 AM. J. INT’L L. 114, 122 (1994) (noting that the analysis in *Haitian Centers Council* “is flawed in numerous respects”); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (“*Haitian Centers Council* takes its place atop a line of recent Supreme Court precedent misconstruing international treaties.”); James C. Hathaway, *The Rights of Refugees Under International Law* 290-99 (2005) (noting that the majority’s arguments in *Haitian Centers Council* “have little substance”). Since *Haitian Centers Council*, some have said that due to the United States’ refusal to apply the *non-refoulement* principle in international waters, the principle has broken down. For example, the Australian government and the Italian government have both recently refused to admit certain refugees in violation of the principle of *non-refoulement*. In 2011 the High Court of Australia and in 2012 the European Court of Human Rights struck down these actions by the Australian government and Italian government, respectively.
- 10 *Negusie v. Holder*, 555 U.S. 511, 537 (2009).